Nortech Waste *and* Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL–CIO. Case 20–CA–28884

October 25, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On September 2, 1999, Administrative Law Judge Timothy D. Nelson issued the attached decision. The General Counsel and Charging Party filed exceptions and the General Counsel filed a supporting brief. The Respondent filed a brief in opposition to the exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order[1] as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Nortech Waste, Roseville, California, its officers, agents, successors, and assigns, take the action in the recommended Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraph 2 (b).

"(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid and protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to bargain collectively in good faith with Operating Engineers Local Union No. 3 of the International Union of Operating Engineers AFL–CIO as the exclusive representative of our employees in the production and maintenance unit for which the Union was certified by unilaterally implementing terms for the payment of yearend bonuses as to which we gave no prior notice to the Union. The unit is:

> All full-time and regular part-time production and maintenance employees; excluding office clerical employees, salesmen, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole the employees who received less than $230 as part of our yearend bonus payments implemented on or about December 15, 1998, by paying them the difference between $230 and the amounts they actually received, plus interest.

NORTECH WASTE

Shelley Brenner, Esq., for the General Counsel.
Mark D. Jordan, Esq. (*Bernheim & Hicks*), of Santa Rosa, California, for the Respondent.
David A. Rosenfeld, Esq. (*Van Bourg, Weinberg, Roger, & Rosenfeld*), Oakland, California, for the Charging Party.

[1] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co*., 335 NLRB 142 (2001).

[2] The Respondent has not excepted to the judge's finding that it violated Sec. 8(a)(5) and (1) of the Act. The General Counsel and the Charging Party have excepted to the judge's failure to include a broad cease-and-desist provision in his recommended Order. We note that in *Nortech Waste*, 336 NLRB 547 (2001), the Board adopted the administrative law judge's recommendation that the Board issue a broad order to remedy the unfair labor practices in that case. In light of the Respondent's serious prior unfair labor practices, we agree that a broad Order is warranted here. Accordingly, we shall substitute broad injunctive language requiring the Respondent to cease and desist from violating the Act "in any other manner" for the provision recommended by the judge. *Hickmott Foods*, 242 NLRB 1357, 1357 (1979) (repeat offenders of the Act subject to broad injunctive relief).

DECISION

TIMOTHY D. NELSON, Administrative Law Judge. This is an unfair labor practice prosecution alleging that Nortech Waste (the Respondent) violated Section 8(a)(5) of the National Labor Relations Act, and, derivatively, Section 8(a)(1). The prosecution was brought in the name of the General Counsel of the National Labor Relations Board by the Acting Regional Director for Region 20, who issued a complaint on April 16, 1999, after investigating a charge filed on January 11, 1999, by Operating Engineers Local Union No. 3 of the International Union of Operating Engineers (the Union). I heard the trial of the case in Sacramento, California, on July 20, 1999, where all parties were represented by counsel, each of whom filed post-trial briefs, which I have studied.

The complaint originally charged the Respondent with two, independent violations of bargaining duties owed to the Union under Section 8(a)(5)—first, by refusing to furnish certain information to the Union; second, by committing an unrelated "unilateral change" described further below. However, at the trial's outset, I granted the General Counsel's unopposed motions to withdraw and sever the "information" counts based on a proposed settlement, and to remand those counts to the Regional Director for further disposition. This left for litigation and disposition the allegedly unlawful unilateral change, which is described in paragraph 9(a) of the complaint, in the following (inartful) terms:

> On about December 15, 1998, Respondent prorated the year-end bonus to its Unit employees, rather than paying them the full amount.

This description of the conduct under attack might suggest that the prosecution is alleging that *all* bargaining unit employees received only "prorated" portions of a "full" bonus paid to others outside the "Unit," but that is not, in fact, what the General Counsel intends. Rather, the gravamen of the prosecution's charge is that, although the Respondent paid "full" bonuses to *some* employees in the bargaining unit, it took unlawful unilateral action when it paid *others* in the same unit only a "prorated" portion of the "full" amount.

The Respondent admits that the Board's jurisdiction is properly invoked.[1] It also admits that it paid less-than-"full" bonuses to some of the bargaining unit employees, on a pro-rata basis, geared to the number of hours they had worked during the preceding year. It further admits a set of legal conclusions expressed in paragraph 9(b) of the complaint in the following terms:

> The subject set forth above in subparagraph 9(a) relates to wages, hours, and other terms and conditions of employment of the Unit and is a mandatory subject of bargaining.

However, based on defenses discussed in my concluding analyses, the Respondent denies that its actions were unlawfully unilateral in character.

In the particular circumstances described below, my ultimate judgment is that the Respondent's admitted action in prorating the bonus amounts paid to some employees amounted to an unlawful unilateral change, substantially as alleged in the complaint.

I. FINDINGS

A. General Background

The Respondent sorts and processes waste products for recycling purposes at a facility in Roseville, California, near Sacramento. At material times it used about 65 nonsupervisory employees to do the sorting and facility-maintenance work. On September 24, 1997, the Union won a Board-conducted representation election held in a unit of the Respondent's "production and maintenance" employees, and on October 9, 1997, the Union received Board certification as the exclusive representative of these employees for collective-bargaining purposes.[2] Although the record is indistinct on the point, it appears that most of the employees in the certified unit are classified as "sorters," with others occupying unspecified "maintenance" classifications.

The parties had not concluded an initial labor agreement for the certified unit when this case was tried some 23 months later. In fact, they had held only one, face-to-face bargaining session during that period.

B. Alleged Unfair Labor Practices

The more immediately pertinent background to this case, and the central events themselves, occurred in November-December 1998. In the following summary of relevant events, I will in some instances depart from chronological order, and will sometimes digress to discuss or clarify certain lingering ambiguities in the record.

On Friday, November 20, the Respondent's attorney, Mark Jordan, transmitted a letter by fax to the Union's attorney, David Rosenfeld, stating in pertinent part as follows:

> Please be advised that Nortech . . . is planning to serve a lunch, Tuesday, November 24, 1998, to all its employees in celebration of Thanksgiving. This special celebration lunch of Thanksgiving has never been done before.
>
> If the union objects to this lunch being served, or wishes to bargain about it, kindly contact the undersigned.

Rosenfeld did not reply until after-the-fact, by letter dated December 2, stating as follows:

[1] Specifically, the Respondent admits, and I find, (a) that it was timely served with copies of the Union's charge; (b) that it is a corporation with headquarters offices and facilities in Roseville, California, where it receives and sorts waste products for recycling purposes; (c) that, during calendar year 1998, it provided more than $50,000 worth of services to other business entities, each of which meets the Board's jurisdictional standards on a direct basis; and, therefore, (d) that it is an employer engaged in commerce within the contemplation of Sec. 2(6) and (7) of the Act.

[2] The certified unit is more fully described as follows: "All full-time and regular part-time production and maintenance employees; excluding office clerical employees, salesmen, professional employees, guards and supervisors as defined in the Act."

> Nortech's decision to provide a Thanksgiving lunch is objectionable. The Union would far prefer to see the employees get a bonus for the hard work, which they have done over the last year. For the low pay which workers in the bargaining unit receive, a bonus would be far more welcome. Your letter of November 20th was not faxed to me until almost closing time. This was designed to make sure I did not know about it until it was too late to do anything. Your client should pay everyone a bonus to make up for its mistreatment of the workers.

In the meantime, on November 30, Jordan had mailed another letter to Rosenfeld, stating as follows:

> My file reflects that for several years Nortech has paid its Leadpersons a year-end bonus. It is Nortech's position that it may continue to do that inasmuch as it is only "maintaining the status quo."[3]
>
> In addition to the Leadpersons, Nortech would like to pay each of its Sorters a bonus in the sum of $230.00. It is Nortech's desire to pay that bonus on or about December 15, 1998. In past years Nortech has not paid its Sorters a bonus[4] and is, by this letter, agreeing to bargain about this with the union.
>
> Absent hearing your objection, and/or request to bargain, Nortech will go forward and pay a bonus to its Leadpersons and a $230.00 bonus to the Sorters.[5]

It is obvious from the timing of these latter two communications that Jordan's November 30 bonus proposal was *not* a response to Rosenfeld's December 2 request for a bonus in lieu of a Thanksgiving lunch. It is likewise apparent from the text of Rosenfeld's December 2 letter that this letter was not intended as a response to Jordan's November 30 bonus proposal, but to his November 20 Thanksgiving lunch proposal. Indeed, on this record, it seems quite possible that Rosenfeld was not even aware of Jordan's November 30 bonus proposal when he wrote his December 2 reply on the subject of the Thanksgiving lunch.

In any case, the first positive indication of Rosenfeld's awareness of the company's November 30 bonus proposal is that he called Jordan's office on the subject on or about December 7 or 8, and left a voice mail message for Jordan in which he asked whether the proposed bonus would be paid to all of the employees, including not just the sorters, but others in maintenance classifications, as well. Jordan left a reply on Rosenfeld's voice mail at some (uncertain) later point, affirming that the proposed bonus applied to "all" the employees.[6]

On December 17, Rosenfeld transmitted a fax to Jordan confirming the previous exchange of voice mail messages, and also stating:

> Although Local 3 believes that the employees are entitle [sic] to far greater wage increases, we are willing to agree to the bonus. It should be paid immediately to all employees.

The Respondent did issue bonus checks to "all" the bargaining unit employees, and apparently did so before December 18, when, as noted below, Rosenfeld next communicated with Jordan on the subject, objecting to the amount the Respondent had paid to some of the employees. (*Exactly* when the checks were issued is less certain, as I discuss below.) However, not everyone received the $230 amount. Rather, the Respondent paid that amount only to the 52 employees who had worked 1,700 straight-time hours between January 1 and November 30, 1998. The other 13 workers received lesser amounts, calculated on a pro rata basis, with their actual hours worked during the same period being the critical variable in the calculation. This left one worker, J. Ubias, with a $92 bonus, and several others with bonuses that were significantly below $200.

On December 18, Rosenfeld received reports that some of the sorters had not received the full, $230 bonus, and protested this in a fax to Jordan the same day, stating, in material part:

> That was not your proposal and is unlawful. We demand that you pay all of the Sorters $230.00 and that if any were not paid the full $230.00, they be paid the difference with interest.

Rosenfeld also asked for "a list of all Sorters" and the amounts paid to each of them.

On January 6, 1999, after additional voice communications and written exchanges between Jordan and Rosenfeld, Jordan mailed the requested list to Rosenfeld.[7] However, the Respondent did not accede to Rosenfeld's other demands, holding to

[3] The unit or nonunit status of "Leadpersons" is in doubt on this record, but the question does not figure in the case in any event.

[4] Larry T. Buckle, the Respondent's assistant general manager, testified that, at the end of 1997, the Respondent had issued grocery "gift certificates," worth $30 each, to all of the employees in the operation, including those in the bargaining unit. There is no evidence, however, that the Respondent had ever before paid year-end cash bonuses to bargaining unit employees, much less evidence suggesting that such bonuses had become an established practice in the Respondent's operation. Accordingly, consistent with Jordan's averral in his November 30 letter, it appears that the proposed cash bonus was, indeed, unprecedented.

[5] There is an abiding ambiguity in the documents of record (but not in the parties' own minds, apparently) as to who, exactly, would be recipients of the $230 bonus proposed in Jordan's November 30 letter for employees other than "leadpersons," whose own bonuses are not in question in the case. (The November 30 letter refers to "Sorters" as the intended recipients of the $230 bonus; however, as found below, later communications between Jordan and Rosenfeld clarified that the bonus was intended to apply to "all employees"—in context, a reference encompassing persons in "maintenance" classifications, as well. However, still later communications from Rosenfeld referred again to bonuses paid to "the sorters.") These ambiguities are unimportant. The dispute is not about *who* eventually received bonuses, but about the Respondent's right to have "pro-rated" in certain cases the *amount* of the bonus eventually paid to all employees in the bargaining unit, without regard to whether or not they were "sorters" or occupied some other bargaining unit classification. Counsel for the General Counsel seems to acknowledge this on brief (p. 2, fn. 3), making clear in any case that the prosecution "is pursuing the alleged unilateral change allegation [*sic*] regarding the pro-rated bonus only with respect to the Unit sorters and maintenance employees."

[6] I have just recorded the substance of Rosenfeld's testimony as to the exchange of voice mail messages. In crediting this account, I note that it was vouched for by Jordan himself, who, upon the conclusion of Rosenfeld's account, stated from counsel table that it was "[a]bsolutely correct."

[7] GC Exh. 9.

the position that it had been appropriate to prorate the bonus amounts to the employees with less than 1700 hours.

C. Were the Bonus Payments Made Before the Union "Agreed" to Them

As I have already suggested, the record does not indicate exactly when the Respondent issued the bonus payments, but Rosenfeld's December 18 letter protesting the reduced amount paid to some employees makes it likely, at least, that the bonus payments were made no later than the (uncertain) point on December 18, when Rosenfeld wrote his protest. What remains unclear is whether the payments had already been made by the point when Rosenfeld transmitted the December 17 fax conveying the Union's "agree[ment]" to the bonus and a demand that the bonus be paid "immediately," or whether, instead, the Respondent waited *until* it received the December 17 acceptance before distributing the bonus payments.

My ultimate judgment that the Respondent committed an unlawful unilateral change will not require me to find that the Union's acceptance preceded the issuance of the bonus checks. However, against the possibility that a reviewing body might disagree, I simply enter my observations about the state of the record on this point and indicate the approach I would be required to take if the resolution of the questions of precise timing and sequence *were* deemed to be material to the outcome.

Jordan's November 30 proposal had expressed the Respondent's "desire" to pay the bonus "on *or about* December 15." The complaint alleges, and the Respondent's answer admits, that the bonus payments were made "on about December 15." Moreover, on brief, counsel for the General Counsel uses the same, "on about December 15" formulation in her discussion of the facts.[8] These inexact formulations of the timing, considered in isolation, would not rule out the possibility that the bonus payments were issued at some point *after* the Respondent received Rosenfeld's December 17 acceptance fax.

The Respondent's counsel avers on brief that the payment was, in fact, made "on" December 15.[9] This averral, however, was not accompanied by any citation to a source in the record, and, standing alone, it clearly has no evidentiary value. But the averral does not stand alone: In her opening statement at trial, counsel for the General Counsel appeared to be in agreement with this more precise identification of the timing when she stated (my emphasis): "However, *on December 15th*, the bonus that was paid was not the sum of $230. Rather it was prorated based on the amount of time of attendance of the employee." Moreover, and perhaps dispositive of the question under discussion, counsel for the General Counsel clearly conceded in the Argument section of her brief that Rosenfeld's December 17 acceptance fax came "after the fact."[10]

I note further, however, that the Union has not explicitly embraced the General Counsel's concession that the acceptance came after-the-fact. Indeed, there are two reasons to suspect that the Union's view of the sequence may be contrary to the General Counsel's: First, the text of Rosenfeld's December 17 acceptance fax implied that Rosenfeld *believed* that the bonus had not yet been paid by that date, for he stated, "It should be paid immediately to all employees." Second, in brief oral argument at the trial's conclusion, Rosenfeld stated:

> In summary, the law is clear that if you make a proposal and the union agrees to it, you [sic] got to implement what was agreed to.

Adding to the confusion, however, is that Rosenfeld had testified previously that his "understanding" was that the bonus payment had been made "on or about December 15."

Rosenfeld's apparent belief (as implied either in his December 17 acceptance fax or in his oral argument) that the bonus had not yet been paid as of December 17 is clearly no substitute for proof of the same, and thus I give no weight to that factor. As noted previously, the pleadings are themselves inconclusive as to the question at issue. Obviously, however, counsel for the General Counsel's more particularized reference in opening statement to December 15, as the actual date the bonuses were paid, and her concession on brief that the acceptance came after-the-fact, would effectively estop the General Counsel from arguing later that the acceptance came before-the-fact. Whether the General Counsel's concessions would likewise estop the Union from maintaining such a factual claim at some future point is a trickier question, which, in the absence of such a claim,[11] I need not decide in those terms.

Considerations of estoppel aside, if *any* party's legal position in this case depended on a finding that the Union's acceptance was communicated prior to the point when the Respondent issued the bonuses, that party properly bore the burden of establishing such a sequence by a preponderance of the credible evidence in the record as a whole. I regard it as obvious that the muddy record as I have just summarized it could not preponderate in favor of a finding that the Union's acceptance occurred before the fact. Accordingly, for purposes of further analysis, I will assume, consistent with both the General Counsel's and the Respondent's positions, that it did not.

II. ANALYSIS; CONCLUSIONS OF LAW; RECOMMENDED ORDER

A. The Facts Recapitulated

In its November 30 letter, the Respondent advised the Union that it wanted to pay sorters in the bargaining unit a year-end bonus of $230 each, subsequently clarifying that this applied to "all" the employees in the bargaining unit. The Respondent "agree[d]" in the November 30 letter to bargain with the Union about the payment of the proposed bonus before implementation, but also stated that, absent prior objection or the Union's request to bargain, it would implement the proposed bonus plan

[8] GC Br. at 1: "On about December 15, 1998, Respondent paid a bonus to all its employees."

[9] R. Br. at 3, stating, after previously referring to an information request letter from Rosenfeld dated December 14: "On the following day, as it had advised the Union, Nortech paid the bonus[.]"

[10] GC Br. at 7: "Although by its terms, Respondent's [November 30] offer did not require an express acceptance by the Union, the Union provided a written acceptance after the fact."

[11] In fact, the Union's written brief (authored by Rosenfeld) makes no such distinct claim, and the claim was merely implicit in Rosenfeld's prior oral argument.

roughly 15 days later, i.e., "on or about December 15." The Union neither objected nor sought to bargain over this proposal prior to December 15.

When the Respondent "implemented" the proposal, however, it did not do what it had told the Union it intended to do, that is to pay "all" employees the $230 amount. Rather, it deviated from the proposal by paying the full amount only to those bargaining unit employees with 1700 straight-time hours in the preceding year, and by paying a lesser, pro rata amount to workers with fewer hours during the same period. Moreover, it is clear that the Respondent reached the decision to impose the 1700-hours restriction on eligibility for the full bonus on a "unilateral" basis; that is, that it never preadvised the Union of any such contemplated restriction, nor did it invite bargaining over such a restriction.

B. The Ultimate Issue Identified; the Questions that are Not Presented

Considering the undisputed factual circumstances, the ultimate issue in the case is this: Did the Respondent violate Section 8(a)(5) by implementing a bonus arrangement that differed from the arrangement that it had previously told the Union it intended to implement? Before discussing and deciding that issue, however, I deem it worthwhile also to identify what questions are *not* presented by the case as it has been submitted to me:

I am not invited to decide whether the first-time bonuses at issue here were, before their implementation, "mandatory" bargaining subjects within the contemplation of *NLRB v. Borg-Warner Corp*., 356 U.S. 342 (1958).[12] (If they were, it would follow under principles set forth in *NLRB v. Katz*, 369 U.S. 736 (1962), that the Respondent could not implement them without notifying the Union in advance of its intentions, and giving the Union an adequate opportunity to bargain about them, just as the Respondent obviously intended to do by the device of its November 30 letter. If, on the other hand, the matter of the first-time bonuses was merely a "permissive" subject for bargaining, then it would not be at all clear that the Respondent owed a duty to notify or bargain with the Union before conferring them, or even that it owed a duty to notify and bargain with the Union before implementing any changes to the bonus plan as originally proposed.[13]) Still less am I invited to decide nice questions of classification sometimes associated with the application of these principles to situations where the employer has "discontinued" an existing "practice" of conferring special payments or other emoluments on employees in a union-represented bargaining unit. (In such cases, the analysis often depends on whether the special payments or emoluments are properly classified as "wages" or as "gifts." See, e.g., *NLRB v. Wonder State Mfg. Co.,* 344 F.2d 210, 212–213 (8th Cir. 1965).) While such questions of classification might be debatable when applied to the first-time bonuses in this case, the Respondent does not raise them here. Indeed, as noted at the outset, the Respondent's answer to the complaint unqualifiedly admitted allegations set forth in paragraphs 9(a) and (b), as follows (my emphasis):

> (a) On or about December 15, 1998, Respondent prorated the year-end bonus to its Unit employees, rather than paying them the full bonus.
> (b) The subject set forth above in subparagraph 9(a) relates to wages, hours, and other terms and conditions of employment of the Unit *and is a mandatory subject for the purpose of collective bargaining.*

To understand the significance of the Respondent's admissions requires first an understanding of the allegations that it admitted. The formulations used in the complaint may leave marginal grounds for doubt on this score: Thus, a close parsing of the assertion in subparagraph 9(b) might raise doubt at the outset as to exactly what "subject" the Acting Regional Director had in mind when he referred to the "subject set forth in subparagraph 9(a)," for the sentence that comprises subparagraph 9(a) contains many arguable "subjects." For example, if "the subject" as used in paragraph 9(b) is narrowly understood as a term of grammar, it might refer simply to "Respondent," the actor in the sentence that is "set forth" in subparagraph 9(a). But this possibility is easily ruled out, because it would make no sense to characterize "Respondent" as a "mandatory subject for the purpose of collective bargaining." Not that this fully clarifies the complaint-writer's intent, however, for "the subject" could still refer either to the Respondent's "prorat[ing of] the year-end bonus" as a "mandatory subject," or, more generally, to the "year-end bonus" itself as such a "mandatory subject."[14] What seems clear in any case, however, is that the Respondent, in admitting subparagraphs 9(a) and (b) without regard to these subtleties of interpretation, was effectively admitting that matters relating to its yearend bonus in 1998 were, indeed, "mandatory" subjects for bargaining, and was effectively disavowing any defensive claim that such matters were merely "permissive" subjects.

The Respondent's admission of subparagraphs 9(a) and (b) are hardly the only indications that the Respondent regarded the payment of the bonuses as matters requiring notice to the Union and an opportunity to bargain before implementation, i.e., as "mandatory" subjects for bargaining. Jordan's November 30 letter implicitly acknowledged this when he not only gave notice of the company's bonus intentions, but offered to bargain about them if the Union were unwilling to assent to the proposal. In addition, on brief, the Respondent again seems implic-

[12] See also, e.g., *Antelope Valley Press,* 311 NLRB 459 (1993).

[13] See *Allied Chemical & Alkali Workers of America, Local 1 v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 184 (1971) (a modification [under Section 8(d)] is a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissive subject of bargaining.) But compare, e.g., *Hertz Corp.,* 304 NLRB 469 (1991). (Although union membership ratification of labor agreement is only permissive subject for bargaining, union's agreement in precontract bargaining that ratification was condition to conclusion of labor agreement privileged employer's refusal to implement labor agreement until ratification occurred.)

[14] The General Counsel appears on brief to embrace both the particular and the general propositions, arguing in a section heading (at p. 2) that "Respondent unilaterally pro-rated a year-end bonus . . . [,] but also stating (at p. 5) that "Respondent had an obligation to bargain with the Union over the year-end bonus."

itly to acknowledge that it had a statutory duty to notify and bargain with the Union before implementing the proposed bonus. Thus, in the opening sentences of the Argument section of its brief, the Respondent's counsel states (my emphasis):

> It is clear that an Employer with a duty to bargain, *as Nortech concedes it has,* is prohibited from making unilateral changes. Such changes would be deemed as bypassing the union and a clear indication of lack of good faith. In this particular instance, it is equally clear that the bonus payment made to the Sorters [sic] was not done without absolute timely disclosure to the Union.[15]

Finally, the Respondent has nowhere suggested that it was free to take unilateral action on the basis that the bonuses were *not* mandatory subjects of bargaining, much less that they were "gifts." Accordingly, where the Respondent has both expressly and implicitly admitted that bonus-related matters were mandatory subjects for bargaining, and has never suggested to the contrary, I take it as my starting point for analysis that matters relating to the payment of yearend bonuses were indeed, mandatory subjects for bargaining,[16] and, accordingly, that the Respondent owed a statutory duty to satisfy statutory notice and bargaining requirements before paying such bonuses.

C. The Ultimate Issue Revisited

Again, the ultimate issue is: did the Respondent violate Section 8(a)(5) by implementing a bonus arrangement that differed from the arrangement that it had previously told the Union it intended to implement? Now that I have judged for purposes of this case that the bonuses were mandatory subjects for bargaining, I have little difficulty resolving the issue adverse to the Respondent, based on the following reasoning:

First, as the Respondent acknowledges, the Respondent could not lawfully implement *any* new bonus arrangement in the bargaining unit without first notifying the Union of its intentions and, on the Union's request, bargaining in good faith over the proposed arrangement. This is because, as the Respondent asserted on November 30, cash bonuses had never before been paid to sorters, nor, apparently, to anyone other than employees in the "Leadperson" classifications. Thus, the bonuses in question would represent a change from the status quo. And the Board, referring to situations I take as analogous to this one, has clearly stated that, "the same [Katz] bargaining obligation applies whether the issue involved is the employer's unilateral *granting* of merit increases [substitute here "bonuses"] or its unilateral *discontinuance* of them." *Daily News of Los Angeles*, 304 NLRB 511 (1991) (my emphasis), citing *Oneita Knitting Mills*, 205 NLRB 500 fn. 1 (1973). Moreover, the "general rule" is that "an employer must bargain about changes in terms and conditions of employment regardless of how those terms came to be initially established."[17] *Indiana & Michigan Electric Co.*, 284 NLRB 53, 54 (1987).

There can be no doubt on this record that the Respondent's November 30 letter (as clarified by subsequent communications) was intended to, and did, give the Union adequate notice of a certain intention on the Respondent's part—specifically, to pay a $230 bonus to all the bargaining unit employees—and of its willingness to bargain before implementing those intentions. (In fact, the General Counsel and the Respondent appear to be in full agreement on this point, but rely on it for quite different purposes, as noted below.) What these communications did *not* do, however, was to give notice that the Respondent planned to do what it ultimately did—to pay the $230 amount only to employees with 1700 straight-time hours, and to pay only a pro rata portion of that amount to employees with fewer hours. Indeed, the November 30 letter gave no hint of any intention other than to pay "each of its sorters" a $230 amount, and Jordan's later clarification that the proposed bonus was intended to apply to "all" employees effectively precluded the possibility that the Respondent might pay less than $230 to anyone in the bargaining unit.

The Respondent doubtless would have been free to implement its *announced* intentions in the face of the Union's failure to respond in a timely way to those announced intentions. But it does not follow that it was free to implement a bonus plan that was different from the one it had previously announced to the Union. For even when an employer is otherwise free (by virtue of union agreement, bargaining impasse, or union waiver-by-inaction) to "implement" a "last offer," the employer is only free to implement terms that were "reasonably contemplated" within the last offer. See, e.g., *Taft Broadcasting Co.,* 163 NLRB 475, 478 fn. 6 (1967), citing *NLRB v. Intercoastal Terminal, Inc.,* 286 F.2d 954 (5th Cir. 1961).[18] Indeed, when an employer who is otherwise free to implement its last offer implements a term or condition that is materially different from its last offer, its implementation of the different term is "tantamount to implementing changes without notifying the union of the proposed changes," and thus violates basic principles set forth in *Katz,* supra*. Winn-Dixie Stores, Inc. v. NLRB,* 567 F.2d 1343, 1350 (5th Cir. 1978). Moreover, the changes in question clearly qualified as "material, substantial, and significant" within the meaning of the controlling cases.[19] Some employees received only a fraction of the bonus amount that the Respondent had originally stated would be paid to all the employees.

Accordingly, I conclude as a matter of law that the Respondent violated Section 8(a)(5) by implementing a bonus plan containing pro rata features as to which the Respondent failed to give the Union *any* prior notice or opportunity to bargain.[20]

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[15] I think the latter sentence is best understood as an affirmative declaration that "[I]t is absolutely clear that the bonus payment *was* done *with* absolute timely disclosure to the Union."

[16] See, by analogy, *Detroit Newspapers*, 326 NLRB 700, 705 (1998), where, in the absence of exceptions to the administrative law judge's finding that "proposition 1" was a mandatory bargaining subject under the applicable precedents, the Board assumed the same thing for purposes of further analysis.

[17] *Indiana & Michigan Electric Co.*, 284 NLRB 53, 54 (1987).

[18] See also *NLRB v. Crompton-Highland Mills, Inc.,* 337 U.S. 217 (1949).

[19] *Bath Iron Works Corp*., 302 NLRB 898, 901 (1991). See also, e.g., *Southern California Edison Co*., 284 NLRB 1205 fn. 1 (1987).

[20] On brief, counsel for the General Counsel takes a different theoretical approach: She argues that even though the Union's September 17 acceptance fax may have come after-the-fact, the Respondent had effectively obtained the Union's assent or "agreement" to pay a flat, $230 bonus to all workers in the unit prior to the point when the bo-

On brief, the Respondent appears to accept, even to insist on, many of the points made previously. Thus, proceeding from the assumption that the matter of the year-end bonus *was* a bargainable term and condition of employment at the outset, and could not be implemented on a unilateral basis, the Respondent urges that the Union's silence in the face of its announced intentions left the Respondent free to "implement" the bonus "as it was originally intended."[21] On what basis then, does the Respondent nevertheless defend its actions? As best as I can determine, the Respondent invokes two, alternative defenses, neither of which is persuasive, as I discuss next.

The Respondent appears to argue first that the "bonus as originally intended" was to pay $230 only to employees who satisfied included the 1700-hour minimum eligibility requirement, and to pay a pro rata share to employees with fewer hours. I reject this claim as utterly without support in the record. There is no evidence of the Respondent's "original" intentions other than what is expressed or may be inferred from its pre-implementation communications with the Union. Those communications indicated simply that the Respondent intended to pay $230 to all the employees in the bargaining unit—period.

Alternatively, the Respondent argues that the Union's silence in the face of the Respondent's November 30 proposal amounted not merely to its "assent" to the payment of the bonus as proposed, but to a "waiver" on the Union's part "to bargain about the finer details of the implemented bonus."[22] The Respondent appears to rely on *U.S. Lingerie Corp.,* 170 NLRB 750 (1968), as authority for this proposition. The cited case is inapposite. Its holding does not even remotely imply that a union which fails to object to an employer's announced intention to implement a particularly-described change has thereby waived all future interest in the matter, leaving the employer free thereafter to tinker with the "finer details" of the change at the implementation stage. Rather, consistent with the authorities previously discussed, the only "waiver" that can be inferred in such circumstances is the waiver of the right to object to implementation of the change as it was proposed to the union. Moreover, where, as here, the Respondent's plan, as implemented, involved material, substantial, and significant changes from the plan as proposed to the Union, it strains credulity for the Respondent now to argue that its bonus plan as implemented merely constituted a "refinement" of the "details" of the plan as presented to the Union.

nuses were distributed. Her reasoning is grounded in the notion that the Union's preimplementation "silence" as to the proposed bonus represented not merely a waiver of the Union's right to object to implementation of the bonus as proposed, but effectively formed a "contract" between the Union and the Respondent that bound the Respondent to implement the bonus as originally proposed. (Thus, the General Counsel invokes *Teamsters Local 294*, 87 NLRB 972, 974 fn. 4 (1949), recognizing the rule of contract interpretation set forth in Williston on Contracts, that "assent" to an offer can be construed when "the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent intends to accept the offer.") I note, however, that the complaint did not allege the existence of any affirmative "agreement" between the parties that would require the Respondent to implement the bonus as originally proposed, only that the Respondent took unlawful unilateral action when it implemented a bonus plan containing features that had never been proposed nor bargained about prior to implementation. Accordingly, I find that this argument exceeds claims made in the complaint. Moreover, it is an argument that need not be reached in the light of the reasoning I have outlined for sustaining the complaint as it currently reads.

[21] R. Br., p.4.

[22] Ibid.

THE REMEDY

"In cases of this type, it is the Board's customary policy to order respondents to rescind unilateral changes and to reinstate the conditions that existed prior to the unilateral action." *Exxon Research & Engineering Co.,* 317 NLRB 675, 676 (1995), enf. denied 89 F.3d 228 (5th Cir. 1996). Here, the "conditions that existed prior to the unilateral action" were that the Respondent planned that all employees in the bargaining unit—and not just some of them—would receive a $230 bonus. Accordingly, to restore the status quo ante, my recommended order provides, inter alia*,* that the Respondent make whole the employees who received less than the full, $230 bonus by paying them the difference between $230 and the amounts they actually received, plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, Nortech Waste, of Roseville, California, its officers, agents, successors, and assigns, shall,

1. Cease and desist from

(a) Failing and refusing to bargain collectively in good faith with the Union as the exclusive representative of employees in the certified unit previously identified by unilaterally implementing terms for the payment of year-end bonuses as to which the Respondent gave no prior notice to the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the employees who received less than $230 as part of the Respondent's year-end bonus payments implemented on or about December 15, 1998, by paying them the difference between $230 and the amounts they actually received, plus interest.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its processing facility in Roseville, California, copies of the at-

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

tached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time on or after December 15, 1998.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."